

No. 90-420

Supreme Court, U.S.
F I L E D
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JOSEPH F. SPANIOLO, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1990

JACK MANUEL ALVAREZ, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the investigative stop of petitioner's car by police was supported by reasonable suspicion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-26) is reported at 899 F.2d 833. The order of the district court suppressing evidence (Pet. App. 27-38) is reported at 694 F. Supp. 734.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1990. A petition for rehearing was denied on June 7, 1990. The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the Central District of California for possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d); and possession of a firearm with the serial number removed, in violation of 26 U.S.C. 5861(h). The district court granted petitioner's pretrial motion to suppress evidence. Pet. App. 27-38. The court of appeals reversed and remanded the case for trial. Pet. App. 1-26.

1. On May 12, 1988, an unidentified male telephoned the Santa Ana, California, Police Department and stated that a bank robbery would occur "in about 10 minutes at the Bank of America on Eighth and Main. The man is driving a white Mustang GT and he's got explosives with him." Pet. App. 2. The caller described the driver as "tall dark, looks kinda Mexican and he's probably in the back of the bank." *Ibid.*

Several police officers drove to the bank identified by the caller. There, they saw a white Mustang GT, which was backed into a parking space so as to face the bank. Pet. App. 2, 29. Inside the car was a dark-haired male with Hispanic features, later identified as petitioner. *Ibid.* After a marked police car drove past the bank within petitioner's field of vision, petitioner pulled out of the parking space and drove away. *Id.* at 3. The police followed and pulled petitioner's car over several minutes later. *Ibid.* While placing petitioner's arm behind his back, an officer noticed a bulge in petitioner's jacket and removed a loaded pistol. *Ibid.* A pat-down search revealed another loaded pistol and two ammunition

clips. *Ibid.* A search of the trunk of the car yielded a partially assembled M-6 machine gun, an M-16 automatic rifle, more ammunition, and a quantity of cocaine. *Ibid.*

2. Petitioner moved to suppress the evidence seized from him and from his car. The district court granted the motion, holding that the police lacked reasonable suspicion to stop petitioner's car. Pet. App. 27-38. The court found that the only information the police had to connect petitioner to a bank robbery was an "unadorned statement * * * from an unidentified informant." *Id.* at 34. In the court's view, while petitioner was under surveillance he "did nothing from which it might be concluded that he had gone to the bank for the purpose of robbing it, or that he was carrying explosives." *Ibid.*¹

3. The court of appeals reversed. Pet. App. 1-26. The court held that the anonymous tip, when considered together with the police observations at the scene, gave rise to reasonable suspicion justifying the stop. Pet. App. 5-9. The court determined that the police surveillance of petitioner "verified each of the details of the tip." *Id.* at 8. Petitioner and his car were found at the location identified by the informant, and both petitioner and the car matched the

¹ The court expressed concern about evidence at the suppression hearing suggesting that the tipster, identified at the hearing as Michael Soler, might have placed the call on May 12, 1988, at the behest of police to create the appearance of reasonable suspicion for the stop. Pet. App. 37. The court determined, however, that the evidence of fabrication was inadequate to justify suppressing the evidence. *Id.* at 38. The court made no findings on that issue in light of its holding that police lacked reasonable suspicion for the stop. *Ibid.* Petitioner did not raise that issue on appeal, nor does he raise it here. See *id.* at 6.

informant's descriptions. *Ibid.* Moreover, petitioner's car "was parked in the bank's parking lot and was unusually positioned—front end facing outward." *Ibid.* Finally, after waiting in the car at least five minutes, petitioner "did not depart from the bank until one of the[] marked police cars drove within [his] line of sight." *Ibid.* The court concluded that this conduct, viewed in light of information that had already been verified in significant respects, was "consistent with the actions of a would-be bank robber who decided to take a break until the coast was clear." *Ibid.* The tip and police officers' independent observations thus gave the police "a particularized and objective basis for making the investigatory stop of [petitioner's] vehicle." *Id.* at 9.

The court further held that the stop "did not escalate[] to a full arrest" when the police drew their guns and directed petitioner to step out of his car. Pet. App. 9. The court based that holding on the principle that during an investigative stop "a police officer may take reasonable measures to neutralize the risk [of] physical harm and to determine whether the person in question is armed." *Id.* at 10 (citing *United States v. Hensley*, 469 U.S. 221, 235 (1985), and *Terry v. Ohio*, 392 U.S. 1, 24 (1968)). In this case, the court determined, the police acted reasonably in approaching petitioner with guns drawn because the tip that petitioner was carrying explosives and the officers' subsequent observations gave them "legitimate reasons to fear for their safety." *Id.* at 11.

For similar reasons, the court held that the frisk of petitioner was a reasonable measure "to allow the officer[s] to pursue [their] investigation without fear of violence." Pet. App. 11-12:

[T]he corroborated details of the anonymous tip noted by the officers allowed them to form the reasonable suspicion that [petitioner] was armed with explosives. Additionally, when the officers placed [petitioner's] arm behind his back they observed a large bulge underneath his jacket. The visible bulge was a significant factor in clueing in the officers to [petitioner's] possession of a gun.

The court also held that, upon the discovery of two concealed, loaded pistols, the police had probable cause to conduct a warrantless search of the trunk of petitioner's car. Pet. App. 13.

Judge Reinhardt dissented. In his view, the police did not have lawful grounds to stop petitioner's car. Pet. App. 13-26. He considered the anonymous tip "false," since it alleged that petitioner was carrying explosives. Pet. App. 13-14. Moreover, he found that the police surveillance of petitioner corroborated only "neutral facts that failed to suggest the existence of any criminal activity." *Id.* at 14.

ARGUMENT

Petitioner contends (Pet. 7-25) that the stop of his car violated the Fourth Amendment because it was not supported by reasonable suspicion.

1. At the outset, we note that this case is in an interlocutory posture. The court of appeals reversed the district court's suppression order and remanded the case for trial. Thus, petitioner is in the same position he would have occupied if the district court had denied his motion to suppress and admitted the evidence at trial. If petitioner is acquitted after a trial on the merits, his present contention will be moot. If, on the other hand, petitioner is convicted and his conviction is upheld on appeal, he will then

be able to raise his Fourth Amendment claim, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. For that reason, review of petitioner's Fourth Amendment claim at this juncture would be premature.

2. A law enforcement agent may make an investigative stop of an automobile if the agent reasonably suspects that the driver is involved in criminal activity. See, e.g., *United States v. Sharpe*, 470 U.S. 675, 682 (1985). Last Term, in *Alabama v. White*, 110 S. Ct. 2412 (1990), the Court addressed the question "whether an anonymous tip may furnish reasonable suspicion for a stop" and concluded that it may. As in this case, the police in *White*, acting on an anonymous tip, placed White under surveillance, made an investigative stop of her car, and in a subsequent search uncovered contraband. 110 S. Ct. at 2414-2415.² During their surveillance of White, the police did not observe any unlawful conduct, but they did verify several significant details of the tip. *Id.* at 2416-2417. The Court held that, by virtue of their independent corroboration of some important details of the tip, the police had reasonable suspicion for the stop, based on "the proposition that because an informant is shown to be right about

² In *White*, the anonymous tipster told police that White would leave her apartment and drive to a motel carrying an ounce of cocaine in an attaché case. 110 S. Ct. at 2414. Police drove to White's apartment, where they watched her get into a car of the type described by the tipster and begin driving the route to the motel that the tipster had mentioned. *Ibid.* The police stopped White's car short of the motel and in a search of her car discovered an attaché case containing marijuana. *Id.* at 2414-2415. After the police arrested White, they found three milligrams of cocaine in her purse. *Id.* at 2415.

some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity." *Id.* at 2417.

Here, as in *White*, the tip was quite detailed, and the police independently corroborated significant details of the tip. They therefore had reasonable grounds for an investigative stop. Their surveillance verified the tipster's description of petitioner, petitioner's car, and its location. Pet. App. 8. Moreover, the position of petitioner's car—facing the bank, backed into a parking space in a manner that would facilitate a quick departure—tended to support Soler's statement that petitioner was preparing to rob the bank. *Ibid.* The police had still further grounds to believe Soler's statement when, after sitting in his car for at least five minutes, petitioner drove away as soon as a marked police car came within his line of sight. *Ibid.* Under these circumstances, the police had reasonable grounds to suspect that the tipster correctly informed them that petitioner was planning to rob the bank. The court of appeals therefore correctly concluded that, viewed "from the perspective of an experienced law officer, * * * the officers had a reasonable suspicion that [petitioner] was involved in criminal conduct." *Id.* at 7-8.³

³ One detail of the informant's tip in this case proved to be inaccurate. Petitioner was not armed with explosives. However, he was armed with two pistols, two ammunition clips, a partially assembled M-6 machine gun, an M-16 fully automatic rifle, and ammunition for the machine gun and the automatic rifle. Pet. App. 3. As in this case, the tipster in *White* was incorrect about certain details with respect to the contraband *White* was carrying. 110 S. Ct. at 2414-2415. In *White* and in this case, those inaccuracies came to light only

Petitioner's attempt (Pet. 10, 13-15) to distinguish this case from *White* is unconvincing. This Court did not hold in *White* that reasonable suspicion for an investigative stop can develop only from an anonymous tip that "predict[s] * * * future activity" (Pet. 7). On the contrary, the Court in *White* reaffirmed that reasonable suspicion must be judged by the totality of the circumstances at the time of the stop. 110 S. Ct. at 2416. See also *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989); *United States v. Cortez*, 449 U.S. 411, 417-418 (1981). Moreover, petitioner's conduct while he was under surveillance corroborated the tip in this case more strongly than *White*'s conduct corroborated the tip about her. *White* was merely observed driving away from her apartment empty-handed. *White*, 110 S. Ct. at 2414. By comparison, petitioner was found waiting in a car at the scene of the predicted crime, he was parked in a manner consistent with possible criminality, and he left the scene as soon as a marked police car came into view. Pet. App. 8. The timing of petitioner's departure, considered in light of the tip, the corroboration, and the police's observations of petitioner suggested that he had been planning a robbery and had abandoned his plan only when he saw the police. Petitioner's conduct there-

after the investigative stop was made. Pet. App. 3; *White*, 110 S. Ct. at 2415. Thus, they do not impugn the reasonableness of the stop, which must be judged at the time of the stop. See *id.* at 2416-2417. See generally *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2799-2800 (1990); *Maryland v. Garrison*, 480 U.S. 79, 85-86 & n.9 (1987). Petitioner is therefore incorrect in characterizing the tip as "patently false" (Pet. i) and in contending (Pet. 16-17) that the later-revealed inaccuracy retroactively invalidated the stop.

fore furnished an even stronger basis for reasonable suspicion than was present in *White*.⁴

The police did not transform the investigative stop into an arrest when they approached petitioner with their guns drawn. Because the police were informed that petitioner was carrying explosives, and the source of that information had been shown to be accurate in other respects, the police were understandably concerned that petitioner would be armed. They were therefore entitled to approach petitioner with their guns drawn to ensure their safety and that of bystanders. See, e.g., *United States v. Hensley*, 469 U.S. 221, 224-225, 235 (1985); *United States v. Ocampo*, 890 F.2d 1363, 1368-1370 (7th Cir. 1989) (citing cases); *United States v. Buffington*, 815 F.2d 1292, 1300-1301 (9th Cir. 1987). See generally *Adams v. Williams*, 407 U.S. 143 (1972). After the agents seized two loaded guns from petitioner, they had probable cause to search his car. The search of the car on probable cause was lawful under the vehicle exception to the warrant requirement of the

⁴ Petitioner's reliance (Pet. 14) on *Illinois v. Gates*, 462 U.S. 213 (1983), is misplaced. *Gates* "dealt with an anonymous tip in the probable cause context." *White*, 110 S. Ct. at 2415. *Gates* is not directly applicable in this case, because "reasonable suspicion can arise from information that is less reliable than that required to show probable cause." *White*, 110 S. Ct. at 2416. Thus, the tip in *White* "was not as detailed, and the corroboration was not as complete, as in *Gates*" (*ibid.*), but the Court concluded that they were "enough to justify the stop" (*id.* at 2417). See also *Adams v. Williams*, 407 U.S. 143, 147 (1972) (Court assumed unverified tip from known informant did not establish probable cause but concluded that it did justify investigative stop). The court of appeals in this case correctly reached the same conclusion with regard to the stop of petitioner. See generally *United States v. Sokolow*, 109 S. Ct. 1581, 1585 (1989).

Fourth Amendment. See *United States v. Ross*, 456 U.S. 798 (1982).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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